APPEAL NO. 93011
FILED FEBRUARY 19, 1993

A contested case hearing was held in (city), Texas, on November 5, 1992, (hearing officer) presiding as hearing officer. He determined that although the appellant (claimant) sustained an injury on (date of injury), there was no causal connection between the injury and a subsequent infection and amputation of his lower left leg. The hearing officer also determined that the claimant failed to give timely notice of his injury and, accordingly, denied benefits under the Texas Workers' Compensation Act TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq* (Vernon Supp. 1993) (1989 Act). Claimant appeals urging error in several of the hearing officer's findings of fact and conclusions of law. An untimely response was filed and will not be considered. From the file it is apparent that proper service was made on the "other party" (carrier) as required by Rule 143.3(a)(4), Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (TWCC Rule 143.3(a)(4), on January 4, 1992 and a response was not mailed or delivered to the Commission on or before January 21, 1992. *See* Texas Workers' Compensation Commission Appeal No. 92219, decided July 15, 1992.

DECISION

Finding the evidence sufficient to support the hearing officer's decision in this case, we affirm with modification as set forth below.

The evidence in this case is set out in great detail in the hearing officer's Decision and Order and is adopted for purposes of this decision. Briefly, the claimant testified that on or about October 15th he stepped on a nail or wire that went through his shoe (sneaker) and felt it near a bunion or corn which had been under the little toe of his left foot for sometime. He stated that he did not think much about it, did not report it to anyone at the time and did not pause but continued working. He stated because he was a diabetic he checked his feet daily and did so between October 15th and November 7th but that he did not notice anything, did not see any blood and everything was fine with his foot over the ensuing days. He started limping on November 7th because of his left foot and subsequently went to a hospital emergency room by ambulance on November 8th. He claims he told the doctor about the October 15th injury, and that after some treatment he was released. He went back on November 12th and since the infection seemed to have spread, he was admitted. He claims he told his employer about the injury when the employer visited him in the hospital on the 12th. He also stated he told his minister, (Mr. C) about the injury when he saw him at the hospital and that Mr. C told the employer. He received treatment and therapy but because of complications related to the diabetes, the infection under the bunion or corn resulted in gangrene and his toe and ultimately his lower left leg were amputated.

A statement and deposition of the treating doctor, (Dr. W) indicates that when the claimant came to the hospital he had a large callous on the bottom of his left foot with

infection under it. Dr. W states he saw no signs of a puncture or injury at the time, that based upon his experience he would expect to see something and that it would be evident if there had been an on the job puncture wound as alleged by the claimant. The claimant, in response to a specific question about whether he had been injured on the job, stated that it did not happen at work. Dr. W stated the claimant was diabetic and that according to the last blood sugar prior to November 8th, his blood sugar was well out of control. He indicated that a foot infection is a common thing that is discussed with diabetics because "any type of foot infection has to be treated aggressively" because of the diabetes and that infection would be fairly rapid without treatment. He stated that presupposing there was a puncture injury on October 15th, there would not be time to develop a callous over it.

Mr. C testified that he spoke with the claimant's employer at the hospital on the 13th of November and told her that the claimant's problems was a result of something he stepped on. He stated, contrary to what the claimant testified, that the claimant first told him in late October that he had stepped on a nail at work. Claimant indicated that he had not put his October injury and the problem on 7 and 8 November all together until he was at the hospital.

A deposition and a statement of the employer, (Mrs. L), indicated that she was unaware that there was any connection between the claimant's foot problem and his job or that he was filing a claim, until months later. She stated that he did not mention anything about stepping on a nail or being injured on the job and only told her he had a sore place on his foot. She saw him at the hospital, where she visited him several times a day, and he told her he had an infected corn on the bottom of his foot. Mrs. L was first notified by the carrier's adjustor that there was a claim "months" after the incident. She also indicated that on November 21st she filled out an Employer's First Report of Injury form (Texas Workers' Compensation Commission Form TWCC-1) which was introduced in evidence by the carrier. She stated that her insurance agent recommended she do so (apparently when she indicated the claimant was in the hospital) to be on the safe side. When called by the carrier's adjuster, she told the adjuster that she did not have any knowledge of an injury but that her insurance agent recommended filing a form. The form indicates that the injury was reported on November 8th because that was the date the claimant went to the hospital. The form does not give any information of an on-the-job injury and refers to an "infection on bottom of foot" and indicates cause of injury as "do not know."

(Ms. KW), carrier's adjuster, testified that she first became involved in the claim when she received the TWCC-1. She talked to Mrs. L as indicated above and also called the insurance agent about why the form was filed and was told that he wanted to leave the decision to the carrier. She also talked to the claimant in the hospital on December 31, 1991, and he told her he had not told Mrs. L of an on-the-job injury.

The findings of fact and conclusions of law which the claimant feels are "wrong" are:

FINDINGS OF FACT

No. 10:That the employer was first aware that Claimant had an on the job injury on November 21, 1991, the date of employer's first report of injury.

No. 11:That there is no causal relationship between Claimant's injury on (date of injury), and his infection of his little toe on his left foot on or about November 7, 1991.

No. 12: That Claimant did not give notice to his employer that he had been injured on the job within 30 days after his injury of (date of injury).

CONCLUSIONS OF LAW

No. 3:That there is no causal connection between Claimant's injury of (date of injury), and his subsequent infection and amputations of his little toe and then the lower left leg.

No. 4:That Claimant did not timely report his injury.

No. 5:That the Claimant is not entitled to benefits under the Texas Workers' Compensation Act.

In a workers' compensation case, as in other civil cases, the plaintiff or claimant has the burden of proving elements of the asserted claim by a preponderance of the evidence. Martinez v. Travelers Insurance Co., 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ); Abeyta v. Travelers Insurance Co., 566 S.W.2d 708 (Tex. Civ. App.-Amarillo 1978, writ dismissed). The hearing officer found (and it is not challenged on appeal) that on or about (date of injury), and while performing his work, the claimant stepped "on something such as a nail or a piece of wire which pierced his shoe and punctured his toe." However, he found from the evidence that a causal connection between the injury of (date of injury), and the infection of the claimant's little toe on his left foot which manifested itself on November 7, 1991, was not established by the evidence. There is clearly sufficient evidence to support this finding. The claimant's own testimony, which the hearing officer obviously believed concerning the October 15th incident, established that he did not "pay any mind" to his foot after stepping on the object, did not take off his tennis shoe or examine his foot, continued

working without any pause, did not see any "blood or anything" when he examined his foot at night (as a diabetic he testified he regularly examined his feet at night), and that "everything was fine" and he continued working without any problem until his corn or bunion became infected on November 7th. The deposition of the treating doctor offered by the carrier provides probative evidence that there was no causal connection between whatever occurred on October 15th, and the infection under the corn or bunion which was diagnosed by the treating doctor when he saw the claimant in the emergency room on November 8, 1992. The proof here fails in causally connecting the claimant's physical condition or injury on November 7th and 8th with his work and the injury which occurred on October 15th. To be compensable, the injury (of November 7th and 8th) must be established to have arisen out of the employment. *See* Parker v. Employers Mutual Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969). With the posture of the evidence in this case, there is no basis to hold that the hearing officer's finding of no causal connection is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951). To the contrary, there is clearly sufficient evidence to support his Finding of Fact No. 11.

With regard to the hearing officer's Finding of Fact No. 10 that the employer was first aware of an on-the-job injury on November 21st, (based apparently on the form dated November 21, 1991 sent in by Mrs. L on the recommendation of her insurance agent), we do not find probative evidence of such knowledge. Other than the circumstance that the form is entitled Employer's First Report of Injury, there is nothing to show the employer had knowledge of an on-the-job injury. By his Finding of Fact No. 12 above, the hearing officer apparently did not accept the claimant's account that he told his employer within 30 days from October 15th, therefore, the evidence does not show the employer had anything to base knowledge on. The reason the report was filled out was covered in the testimony of Mrs. L and Ms. KW and the report does not reflect information about an on-the-job injury. There simply is no sound basis in the evidence of record that the employer became aware of an on-the-job injury on November 21, 1991. Accordingly, we cannot sustain the hearing officer's Finding of Fact No. 10.

There is, however, sufficient evidence of record to support the hearing officer's finding of Finding of Fact No. 12 that notice was not given within 30 days of the injury on (date of injury). The testimony to establish that notice was given within 30 days consisted of that of the claimant and Mr. C. Of course, the hearing officer is the sole judge of the weight and credibility of the evidence (Article 8308-6.34(e) and he may well believe some parts of a witnesses testimony and disbelieve other parts. Taylor v. Lewis, 553 S.W.2d 153, (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Although he obviously believed part of the claimant's testimony regarding the stepping on an object on October 15th, he did not believe his testimony that he told the doctor on November 8th and his employer on November 12th of the injury. Nor did he apparently believe the testimony of Mr. C that he, Mr. C, told the employer of the work-related injury. With regard to Mr. C, it is apparent that his testimony

was in conflict with that of the claimant's regarding when he, Mr. C, was told of the work-related injury. The evidence contrary to the assertion of the claimant that he told the doctor and Mrs. L of the work-related injury is the adamant denials by both Dr. W and Mrs. L, and the testimony of Ms. KW who stated that the claimant told her he did not tell Mrs. L. Given this testimony, together with other circumstances such as the lack of any indication in any medical reports or other treatment documents to indicate any assertion of a job-related injury, the evidence is clearly sufficient to support the hearing officer Finding of Fact No. 12.

In accordance with the reasons set forth above, with the exception of Finding of Fact No. 10 which is set aside, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge